Supreme Court, U.S.
FILED
MAR 4 1987
JOSEPH F. SPANIOL, JR.
CLERK

CASE NO. 86-1284

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the Connecticut Department of Corrections, in his individual capacity,

Petitioner,

v.

ERNEST P. MELE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF OHIO AND ELEVEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Counsel of Record
Federal Litigation Chief

THOMAS J. O'CONNELL
Assistant Attorney General
State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

ATTORNEYS FOR AMICI CURIAE STATE OF OHIO

GRACE B. SCHAIBLE
Attorney General, State of Alaska

ROBERT K. CORBIN
Attorney General, State of Arizona

ROBERT A. BUTTERWORTH
Attorney General, State of Florida

WARREN PRICE, III
Attorney General, State of Hawaii

ROBERT T. STEPHAN
Attorney General, State of Kansas

WILLIAM L. WEBSTER
Attorney General, State of Missouri

ROGER A. TELLINGHUISEN
Attorney General, State of South Dakota

DAVID L. WILKINSON
Attorney General, State of Utah

JEFFREY L. AMESTOY
Attorney General, State of Vermont

KENNETH O. EIKENBERRY
Attorney General, State of Washington

DONALD J. HANAWAY
Attorney General, State of Wisconsin

QUESTION PRESENTED FOR REVIEW

WHETHER A CONSTITUTIONAL RIGHT TO A PRETERMINATION HEARING PROMULGATED IN *CLEVELAND BD. OF EDUC. V. LOUDERMILL*, 105 S. CT. 1487 (1985) CAN BE DETERMINED TO HAVE BEEN CLEARLY ESTABLISHED WHEN PRIOR TO THAT DECISION, THE FEDERAL COURTS WERE DIVIDED AS TO WHETHER THE CONSTITUTION MANDATED SUCH A RIGHT.

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED FOR REVIEW i
TABLE OF AUTHORITIES iii
TABLE OF AUTHORITIES CONT'D iv
INTEREST OF AMICI CURIAE 2
SUMMARY OF ARGUMENT 2
ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS EFFECTIVELY HOLDS STATE PUBLIC OFFICIALS TO A GREATER UNDERSTANDING OF THE LAW THAN OUR NATION'S JUDICIARY AND IS THEREFORE IN CONFLICT WITH THIS COURT'S DECISION IN *MITCHELL V. FORSYTHE*, 105 S. Ct. 2806 (1985) 3

II. THE DECISION OF THE SECOND CIRCUIT MUST BE OVERTURNED TO FACILITATE THE PROMPT DISMISSAL OF CIVIL RIGHTS ACTIONS WHICH SEEK TO RECOVER DAMAGES FROM PUBLIC OFFICIALS WHO DID NOT PROVIDE PRETERMINATION HEARINGS PRIOR TO THE DECISION RENDERED IN *CLEVELAND BD. OF EDUC. V. LOUDERMILL.*, 105 S. CT. 1485 (1985) 6

CONCLUSION 8
CERTIFICATE OF SERVICE 9

TABLE OF AUTHORITIES

Cases:

Abraham v. Pekarski,
728 F.2d 167 (3rd Cir. 1984) 4
Ashton v. Civiletti,
613 F.2d 923 (D.C. Cir. 1979) 4

TABLE OF AUTHORITIES *cont'd*

Cases: **Page**

Best v. Boswell,
696 F.2d 1282 (11th Cir. 1983) 4
Brown v. Brienen,
722 F.2d 360 (7th Cir. 1983) 4
Ciechon v. City of Chicago,
634 F.2d 1055 (7th Cir. 1980) 4
Cleveland Bd. of Educ. v. Loudermill,
105 S.Ct. 1487 (1985) 2, 3, 4, 5, 6
Davis v. Scherer,
468 U.S. 183, *rehearing denied* 468 U.S. 1226 (1984) 4, 7
De Abadia v. Izquierdo Mora,
792 F.2d 1187 (1st Cir. 1986) 5
D'Acquisto v. Washington,
640 F. Supp. 594 (N.D. Ill. 1986) 2
DeSimone v. Bd. of Educ.,
612 F. Supp. 1568 (D.C. N.Y. 1985) 7
Detweiler v. Virginia Dept. of Rehabilitative Services,
705 F.2d 557 (4th Cir. 1983) 4
Gleason v. Bd. of City Comm'rs.,
620 F. Supp. 632 (D.C. Colo. 1985) 7
Harlow v. Fitzgerald,
457 U.S. 800 (1982) 3
Hopkins v. City of Wilmington,
615 F. Supp. 1455 (D.C. Del. 1985) 6
Mitchell v. Forsythe,
105 S.Ct. 2806 (1985) 3, 4, 5
Parfitt v. Columbus Correctional Facility,
62 Ohio St. 2d 434, *cert. denied,* 449 U.S. 1061 (1981). 5
Skeets v. Johnson,
805 F.2d 767 (8th Cir. 1986) 6
Thompson v. Bass,
616 F.2d 1259 (5th Cir. 1980) 4
Tubbesing v. Arnold,
742 F.2d 401 (8th Cir. 1984) 7
United States v. United States District Court,
407 U.S. 297 (1972) 4

TABLE OF AUTHORITIES *cont'd*

Cases: **Page**

Wentz v. Klecker,
721 F.2d 244 (8th Cir. 1983) 4

Miscellaneous

Note Qualified Immunity, 34 Drake L. Rev. 873 (1985) 6

CASE NO. 86-1284

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1986

RAYMOND M. LOPES, Commissioner of the
Connecticut Department of Corrections,
in his individual capacity,

Petitioner,

v.

ERNEST P. MELE,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES
COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF OF THE STATE OF OHIO AND ELEVEN OTHER STATES AS AMICI CURIAE IN SUPPORT OF PETITIONER

Amici, State of Ohio and other states, pursuant to Supreme Court Rule 36.4, respectfully request that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Second Circuit entered in this case on November 6, 1986.

JURISDICTION

The decision of the United States Court of Appeals for the Second Circuit was entered on November 6, 1986. The jurisdiction of this Court is conferred pursuant to 28 U.S.C. §1254[1]

INTEREST OF AMICI CURIAE

This case presents the Court with the opportunity to review the application of the qualified immunity doctrine by addressing the issue of whether the right to a pretermination hearing announced in *Cleveland Bd. of Educ. v. Loudermill,* 105 S. Ct. 1487 (1985) was clearly established prior to the *Loudermill* decision.

Unfortunately, the question presented herein does not arrive from an isolated case. Civil rights actions stemming from the failure of public officials to provide pretermination hearings prior to *Loudermill* are widespread throughout the country.[1] By subjecting public officials to the threat of personal liability, these lawsuits ultimately impair the functioning of state government. Therefore, because a proper application of the qualified immunity doctrine would make lawsuits such as the instant case amenable to summary judgment, the amici have a substantial interest in the outcome of the issue presented herein for review.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Second Circuit held that a public official who failed to provide a state employee with a pretermination hearing could not avail himself of the protection afforded by the qualified immunity doctrine. The court summarily determined that the right to a pretermination hearing had been clearly established prior to

---

[1]As in the instant case, it is not uncommon for such lawsuits to be filed as class actions. *See e.g., D'Acquisto v. Washington,* 640 F. Supp. 594 (N.D. Ill. 1986).

this Court's decision in *Cleveland Bd. of Educ. v. Loudermill*, 105 S. Ct. 1487 (1985).

In light of this Court's recent decision in *Mitchell v. Forsythe*, 105 S. Ct. 2806 (1985), it is clear that the analysis employed by the Second Circuit is flawed. In *Mitchell*, this Court reasoned that public officials should not be held accountable for abridging a right that was not even uniformly recognized by the federal courts. Applying this principle to the instant case reveals that the right to a pretermination hearing was a grey area until the *Loudermill* decision and thus public officials could have reasonably been mistaken as to whether the Constitution mandated such a right.

The significance of the Second Circuit's decision is amplified by the fact that since *Loudermill*, public officials throughout many states have been subject to personal liability for failing to provide pretermination hearings before *Loudermill* was decided. Those cases should have bee amenable to summary judgment pursuant to the standards set forth in *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and its progeny. Instead, such cases continue to interfere with the effective discharge of public service. A writ of certiorari must be granted in order to alleviate further unwarranted litigation.

ARGUMENT

I. THE DECISION OF THE SECOND CIRCUIT COURT OF APPEALS EFFECTIVELY HOLDS STATE PUBLIC OFFICIALS TO A GREATER UNDERSTANDING OF THE LAW THAN OUR NATION'S JUDICIARY AND IS THEREFORE IN CONFLICT WITH THIS COURT'S DECISION IN *MITCHELL V. FORSYTHE*, 105 S. CT. 2806 (1985).

In the recent case of *Mitchell v. Forsythe*, 105 S.Ct. 2806 (1985), this Court expounded upon the application of the qualified immunity docterine. In *Mitchell*, the plaintiff brought suit against a former United States Attorney General, alleging

that in 1970, the Attorney General had authorized a warrantless wiretap. The use of warrantless wiretaps was later found to be violative of the Fourth Amendment's proscription against unreasonable searches and seizures in *United States v. United States District Court,* 407 U.S. 297 (1972) (*Keith*). The Court found that the Attorney General was shielded from liability under the doctrine of qualified immunity because the law announced in *Keith* had not been clearly established at the time the Attorney General had authorized the search. One of the primary factors which led to this determination was the Court's observance that prior to its holding in *Keith,* the lower federal courts were in sharp disagreement regarding the legitimacy of warrantless wiretapping. *Mitchell,* 105 S.Ct. at 2819.

Implicit from the Court's analysis in *Mitchell* is the proposition that when a dichotomy exists among the federal judiciary concerning whether a particular action violates a constitutional right, the right cannot be deemed to have been clearly established. Thus, the disagreement which existed prior to *Loudermill* over whether a pretermination hearing was mandated by the Due Process Clause indicates that the right announced in *Loudermill* had not been clearly established. While some courts had reasoned that pre-*Loudermill* cases compelled a pretermination hearing, *see Abraham v. Pekarski,* 728 F.2d 167, 170 (3d Cir. 1984); *Wentz v. Klecker,* 721 F.2d 244 (8th Cir. 1983); *Ashton v. Civiletti,* 613 F.2d 923, 931 (D.C. Cir. 1979), a substantial number of other courts had held either that a pretermination hearing was not required or that the failure to provide one could be cured by a post-termination hearing. *See Detweiler v. Virginia Dept. of Rehabilitative Services,* 705 F.2d 557, 560 (4th Cir. 1983) (a post-termination hearing with an adequate remedy is sufficient to satisfy due process requirements); *Davis v. Scherer,* 468 U.S. 183, 192, *rehearing denied* 468 U.S. 1226 (1984) (pretermination hearing requirement expressly disavowed by the Fifth Circuit); *Thompson v. Bass,* 616 F.2d 1259 (5th Cir. 1980) (pretermination hearing required, but lack cured by full post-termination hearing); *Brown v. Brienen,* 722 F.2d 360 (7th Cir. 1983); *Ciechon v. City of Chicago,* 634 F.2d 1055 (7th Cir. 1980) (post-suspension

hearing adequate); *Best v. Boswell,* 696 F.2d 1282, 1288 (11th Cir. 1983) (lack of pretermination hearing cured by post-termination hearing); *see also Parfitt v. Columbus Correctional Facility,* 62 Ohio St.2d 434, *cert. denied,* 449 U.S. 1061 (1981) (a state civil service employee did not have a right to a pretermination hearing). Consequently, the Second Circuit's conclusion that the right to a pretermination hearing was "clearly established" prior to *Loudermill* "is to give that phrase a meaning that it cannot easily bear." *Mitchell,* 105 S.Ct. at 2820.

The underlying rationale of *Mitchell,* therefore, is that public officials should not be subject to liability for failing to predict the future course of constitutional law, especially when there are discordant views among the federal courts as to what the Constitution requires. This rationale was reflected in the recent decision of *De Abadia v. Izquierdo Mora,* 792 F.2d 1187 (1st Cir. 1986) in which the First Circuit Court of Appeals further refined the proper scope of protection that is meant to be afforded to public officials under the qualified immunity doctrine. The court stated:

> The first question is what is meant by "clearly established." We consider it to be something less than requiring the public official to show that the principle of law did not exist, or there would be little left; there would be few cases on which officials could succeed. Only rarely do legislatures or courts introduce or change whole principles. More often, the process of change involves a sharpening of lines in the law's grey areas, absent which there could reasonably be excusable mistakes. *Id.* at 1190.

As indicated by the number of conflicting decisions which preceded *Loudermill,* the issue presented in that case undoubtedly involved a grey area of the law. By failing to acknowledge the existence of that grey area, the decision of the Second Circuit improperly restricts the scope of protection that *Mitchell* requires for public officials. In view of the

pervasiveness of civil rights actions that are today filed against public officials, *see* Note, QUALIFIED IMMUNITY, 34 DRAKE L. REV. 873, 877 (1985), any undue erosion of this protection encroaches upon the interests of states throughout the nation. Therefore, it is imperative that a writ of certiorari be granted to review the decision of the Second Circuit Court of Appeals and to prevent any further misapplications of the qualified immunity doctrine.

II. THE DECISION OF THE SECOND CIRCUIT MUST BE OVERTURNED TO FACILITATE THE PROMPT DISMISSAL OF CIVIL RIGHTS ACTIONS WHICH SEEK TO RECOVER DAMAGES FROM PUBLIC OFFICIALS WHO DID NOT PROVIDE PRE-TERMINATION HEARINGS PRIOR TO THE DECISION RENDERED IN *CLEVELAND BD. OF EDUC. V. LOUDERMILL*, 105 S. CT. 1487 (1985).

In *Harlow v. Fitzgerald*, 457 U.S. 800 (1982), this Court refashioned the qualified immunity doctrine in a way which now facilitates the summary dismissal of many insubstantial claims. In formulating this standard, the Court was motivated by several policy concerns which underscore the need for granting at least limited immunity to government officials. In addition to the obvious threat of liability for monetary damages, the Court noted other concerns including "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." Id. at 816. These policy interests are seriously implicated where, as in the instant case, the plaintiff is seeking to recover damages for being denied a pretermination hearing despite the fact that the plaintiff's discharge occurred prior to the *Loudermill* decision.

In such cases, public officials have been held liable for back pay for the period during which the plaintiff was discharged without a hearing, regardless of whether the plaintiff's employment was terminated for just cause. *See Skeets v. Johnson*, 805 F.2d 767 (8th Cir. 1986); *Hopkins v. City of Wilmington*, 615

F. Supp. 1455 (D.C. Del. 1985). Even where courts have held this type of relief to be unavailable, state officials have still been held subject to liability for any damages resulting from the failure to provide a timely hearing, including damages for mental distress. *Gleason v. Bd. of City Comm'rs,* 620 F. Supp. 632 (D.C. Colo. 1985); *DeSimone v. Bd. of Educ.,* 612 F. Supp. 1568 (D.C. N.Y. 1985). Such lawsuits distract officials from their governmental duties and may impose the additional burden of requiring officials to retain their own counsel at their own expense. *Tubbesing v. Arnold,* 742 F.2d 401, 404 n.3 (8th Cir. 1984). Clearly, the exposure of public officials to these costs for violating a "right" that was not even uniformly recognized by the federal judiciary is a measure that disrupts the balance "between the interests in vindication of citizens' constitutional rights and in public officials' effective performance of their duties." *Davis v. Scherer,* 468 U.S. 183, 195 (1984).

The foregoing analysis reveals that the decision of the Second Circuit does not stand in isolation. Rather, state officials throughout the country have encountered personal liability in cases that should have been resolved on summary judgment through a proper application of the qualified immunity doctrine. In order to prevent further undue litigation which would continue to subvert the policy interests which this Court has recognized, a writ of certiorari must be granted.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

ANTHONY J. CELEBREZZE, JR.
Attorney General of Ohio

RITA S. EPPLER
Counsel of Record
Federal Litigation Chief

THOMAS J. O'CONNELL
Assistant Attorney General

State Office Tower
30 East Broad Street, 26th Floor
Columbus, Ohio 43266-0410
(614) 466-5414

ATTORNEYS FOR AMICI CURIAE

CERTIFICATE OF SERVICE

I hereby certify that the requisite number of copies of the foregoing Brief of Amici Curiae, State of Ohio, have been served by U.S. Mail, postage prepaid, on this_____ day of March, 1987 on the following counsel of record:

Joseph I. Lieberman
Robert E. Walsh
90 Brainard Road
Hartford, Connecticut 06114

COUNSEL FOR PETITIONER, RAYMOND M. LOPES

Robert McWeeny
Sherbacow & McWeeny
638 Prospect Ave.
Hartford, Connecticut 06105

COUNSEL FOR RESPONDENT, ERNEST P. MELE

RITA S. EPPLER
Assistant Attorney General